LAM CHI-MING & ORS.

v.

THE QUEEN

PRIVY COUNCIL
LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD GRIFFITHS
LORD GOFF OF CHIEVELEY
LORD LOWRY
[PRIVY COUNCIL APPEAL NO. 39 OF 1990]
27 MARCH 1991

EVIDENCE: *Confession statements - Video tapes of re-enactment of murder - Admissibility - Voluntariness - Reliability 'statement' - Voluntariness - Self incrimination - Principles - Decided cases - English position - Sections 76(5), 82(1) of Police and Criminal Evidence Act 1984 [UK].*

The appellants were convicted of murder and sentenced to death. Their leave to appeal to the Court of Appeal was dismissed; hence this present appeal. The appellants had made confession statements to the police and had re-enacted the murder at the scene of the crime and this re-enactment was video-taped by the police. As a result of the confessions the murder weapon was recovered by the police.

The appellants objected the admission of this videotape evidence on the basis that they had been extracted by police brutality and were not voluntary. A *voir dire* was held and the learned trial Judge ruled that what was said and written by the appellants were inadmissible as they were not made voluntarily. The Judge however ruled that the second videotape which showed the first appellant directing a car to the water front followed by two other cars carrying the second and third appellants were admissible. The video recording then showed each appellant in turn going to the same place on the water front and making gestures indicating throwing the knife into the water at that spot. The Judge also admitted police evidence describing these actions of the appellants which resulted in the recovery of the knife, following the Court of Appeal decision of *R. v. Ng Wai-Ming*.

The question before the Court was whether that part of a confession which is shown to be reliable by the discovery of the evidence to which it relates may be given in evidence despite the fact that the admission may have been obtained by police brutality which renders inadmissible all other parts of the confession.

The Privy Council discussed the inconsistent authorities on the grounds on which involuntary confessions were rejected as inadmissible.

Held:

[1] The more recent English cases establish that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody.

[2] All three of these factors have combined to produce the rule of law applicable in Hong Kong as well as in England that a confession is not admissible in evidence unless the prosecution establish that it was voluntary.

[3] This fundamental rule of the English criminal law, now finds expression in England in s. 76 of the Police and Criminal Evidence Act 1984 and never did admit of the exceptions to be found in the Indian and Ceylon Criminal Codes and in a few cases in the late 18th and early 19th century.

[4] *R. v. Ng Wai-Ming* was wrongly decided and the evidence that the appellants took the police to the place where the money was hidden ought not to have been admitted as it was part of an inadmissible confession.

[5] (a) It is surely just as reprehensible to use improper means to force a man to give information that will reveal he has knowledge that will ensure his conviction as it is to force him to make a full confession. In either case a man is being forced into a course of action that will result in his conviction: he is being forced to incriminate himself;

(b) the privilege against self-incrimination is deep rooted in English law and it would make a grave inroad upon it if the police were to believe that if they improperly extracted admissions from an accused which were subsequently shown to be true they could use those admissions against the accused for the purpose of obtaining a conviction;

(c) it is better by far to allow a few guilty men to escape conviction than to compromise the standards of a free society.

[6] The evidence of the police and the silent video-tape recording relating to the conduct of the appellants leading to the discovery of the knife should not have been admitted as it was evidence of an inadmissible confession.

[7] The evidence adduced by the police, which was the only thing linking the appellants to the murder weapon, would be contrary to the privilege of self-incrimination attached to the appellants.

[Appeal allowed.]

Cases referred to:
Black v. R. [1989] 50 CCC 1
Chalmers v. H.M. Advocate [1954] JC 66
Reg. v. Beere [1965] QDR 370
Reg. v. Berryman [1854] 6 Cox 388
Reg. v. Ramasamy [1965] AC 1
Reg. v. Sang [1980] AC 402
R. v. Wray [1970] 4 CCC 1
R. v. Gould [1840] 9 Car
R. v. Ng Wai-Ming [1980] HKLR 228
R. v. Warickshall [1783] 1 Leach 263
R. v. Wray [1970] 4 CCC 1
Wong Kam-Ming v. The Queen [1980] AC 247

Legislation referred to:
Evidence Ordinance [Ceylon], ss. 25(1), 27(1)
Police and Criminal Evidence Act 1984 [UK], ss. 76(5), 82(1)

For the appellants - Philip Conway Thomas; A Hooper & Co. & GJX McCoil
For the respondent - Macfarianes; A Duckett & Co. & Patrick Li, Senior Crown Counsel

JUDGMENT

Lord Griffiths:

The appellants appeal from the judgment of the Court of Appeal of Hong Kong dismissing their applications for leave to appeal against their convictions for murder for which they were sentenced to death. At the conclusion of the hearing their Lordships announced that they would humbly advise Her Majesty that the appeal ought to be allowed for reasons to be given. This they now do.

On 9 August 1987 a young woman told her brothers and her boyfriend that she had been raped on a number of occasions by the deceased. The prosecution's case was that her brothers, the first and second appellants, and her boyfriend, the third appellant, killed the deceased in vengeance in the small hours of 12 August by stabbing him to death with a knife which they then threw into the sea. The evidence of the prosecution established that the three appellants were seen leaving the Sea Dragon Billiard Hall with the deceased at 2.19 am. on 12 August. The body of the deceased was found at 4.45 am. by the side of the road at Devil's Peak. The time of death was established as between 2.19 am. and 4.45 am. and the cause of death was multiple stab wounds.

The appellants were arrested on 20 August and all made confession statements to the police that day at the airport police station. On the following day, 21 August, the appellants re-enacted what they said they had done to the deceased at Devil's Peak and this was recorded on video-tape with a sound track. The appellants then directed the police to the water front and each in turn pointed to the place at which the knife had been thrown into the water. This episode was also recorded on video-tape with sound. Divers then entered the sea and recovered the knife at the place indicated by the appellants. The knife was identified as the murder weapon because a piece of the blade had broken off the knife and was found embedded in the skull of the deceased.

The appellants objected to the admission of their statements and of the videotape recordings on the grounds that they had been extracted by police brutality and were accordingly not voluntary and therefore inadmissible. The Judge investigated this issue on the *voir dire* and ruled that all that was said and written by the appellants whilst in police custody was inadmissible as the prosecutions had not satisfied him that the statements were voluntary.

The Judge, however, admitted in evidence the second video recording without sound which showed the first appellant directing a car to the water front followed by two other cars carrying the second and third appellants. The video recording then showed each appellant in turn going to the same place on the water front and making gestures indicating throwing the knife into the water at that spot. The Judge also admitted police evidence describing these actions of the appellants which resulted in the recovery of the knife.

The admission of this evidence was, of course, virtually as damning to the appellants as if their entire confessions were admitted. It showed that they knew where the murder weapon was thrown into the sea and it was inconceivable that any one other than the murderers would wish to dispose of the knife in this fashion.

The Judge admitted the evidence because he rightly considered himself bound by *R. v. Ng Wai-Ming* [1980] HKLR 228, a decision of the Court of Appeal in Hong Kong; and the Court of Appeal, applying *Ng Wai-Ming*, rejected the applications for leave to appeal.

A statement can be made as much by demonstration or gesture as by words. In the course of their judgment the Court of Appeal rightly recognised that the admission of the evidence of the leading to the water front and the gesture showing the throwing of the knife being thrown into the water was as much a part of the confession as were the accompanying words to the like effect. And so the question raised by this appeal is whether that part of a confession which is shown to be reliable by the discovery of the evidence to which it relates may be given in evidence despite the fact that the admission may have been obtained by police brutality which renders inadmissible all other parts of the confession.

This is a question to which the English common law has not always given a consistent answer. In *R. v. Warickshall* [1783] 1 Leach 263 Jane Warickshall confessed to receiving stolen property and as a result the stolen property was found in her lodgings concealed in the sackings of her bed. The Court refused to admit her confession in evidence because it had been obtained by promises of favour. Her Counsel argued that as the property had been discovered as a result of her inadmissible confession the evidence of the discovery of the stolen property ought also to be rejected. The Court ruled that facts discovered as a result of an inadmissible confession could be proved but also held:

> Facts thus obtained however, must be fully and satisfactory proved without calling in the aid of any part of the confession from which it may have been derived.

Of course in the case of *its* the fact that the stolen property was found hidden in her bed implicated her as the receiver without introducing any part of her confession in evidence, whereas in the present appeal the mere finding of the knife in the sea in no way implicated the appellants. What implicated them was their admission that they had thrown it into the sea.

In *Warickshall* the Court gave as the reason for rejecting the confession:

> But a confession forced from the mind by flattery of hope, or by the torture of fear comes in so questionable a shape when it is to be considered as evidence of guilt that no credit ought to be given to it; and therefore it is rejected.

The Court was thus giving unreliability as the ground for rejecting confessions which were not voluntary. But logically if unreliability is said to be the sole ground for rejecting a confession obtained by improper means then that part of the confession which can be proved to be reliable by the subsequent discovery of facts that shows it to be true ought to be admitted in evidence. This illogicality was soon recognised and later cases such as *R. v. Gould* [1840] 9 Car. & P 364 and *Thurtell and Hunt* [1824] (Notable British Trials 55 at 144) admitted those parts of an involuntary confession which related to the discovery of the evidence. This development was reflected in the Ceylon Evidence Ordinance which was itself derived from the earlier Indian Criminal Procedure Code of 1861. The Ceylon Evidence Ordinance provided by s. 25(1):

> No confession to a police officer shall be proved as against a person accused of any offence

and s. 27(1) provided that:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

In *Reg. v. Ramasamy* [1965] AC 1 Lord Radcliffe, commenting upon these sections, said:

> The principle embodied in s. 27 has always been explained as one derived from English common law and imported into the criminal law of British India by the legislators in the mid-nineteenth century. It can be traced in English law as early as the late eighteenth century.

In Canada, the Canadian Supreme Court in *R. v. Wray* [1970] 4 CCC 1 applied the same reasoning to admit evidence that an accused led the police to the place in a swamp where he had disposed of a murder weapon although the main body of the confession admitting the murder was held to be inadmissible. It may, however, be doubted if such a case would be decided similarly today in the light of the Canadian Chapter of Rights and Freedom: see *Black v. R.* [1989] 50 CCC 1.

In more recent English cases, however, the justification for the exclusion of an involuntary confession has been put upon wider grounds than its mere unreliability. In *Wong Kam-Ming v. The Queen* [1980] AC 247 a *voir dire* was held to determine whether the accused's confession was voluntary. The Judge held that the confession was inadmissible. During the *voir dire* prosecuting Counsel cross-examined the accused as to the truth of the confession and extracted an admission that it was true. When the trial of the general issue was resumed, prosecuting Counsel called the shorthand writer to prove what the accused had said on the *voir dire*. The Privy Council held that it was improper for the prosecution to cross-examine on the *voir dire* with the object of establishing the truth of the confession; and that when on a *voir dire* the defendant's statement had been ruled inadmissible the prosecution was not entitled at the trial of the general issue to adduce evidence as to what the defendant said during the *voir dire* or to cross examine him on the basis of what he said. This decision cannot be reconciled with the view that possible unreliability is the sole reason for rejecting a confession that has been obtained by improper means, and Lord Diplock said as much during the course of argument: see p. 251. Lord Hailsham of St. Marylebone said at p. 261:

> Any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the Courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubts that the statements was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary.

In *Reg. v. Sang* [1980] AC 402 Lord Diplock and Lord Scarman both gave as the justification for refusing to admit improperly obtained confessions the principle that no man is to be compelled to incriminate himself: see pp. 436 and 454. Lord Salmon put the matter on grounds of unfairness:

> A confession by an accused which has been obtained by threats or promises is inadmissible as evidence against him, because to admit it would be unfair.

The admission of part of a confession because it is established as true by the discovery of evidence to which it relates is not permitted under Scottish Law. In *Chalmers v. H. M. Advocate* [1954] JC 66 a boy of sixteen was interrogated by the police about a murder and then taken by the police to a cornfield where he pointed out to them a purse belonging to the murdered man. The Court held that his answers to the interrogation were inadmissible on the ground that they were not voluntary and, dealing with the evidence of the discovery of the purse, the Lord Justice General said:

The question here was - where exactly is the purse? And this question might have been answered by an oral description of the place where it was, or by going to the place and silently pointing to that place. It seems to me to make no difference for present purposes which method of answering the question was adopted; from which it follows that, if, in the circumstances of this case, the 'statement' was inadmissible, the episode of the cornfield was equally inadmissible. The significance of the episode is plain, for it showed the appellant knew where the purse was. If the police had simply produced, and proved the finding of, the purse, that evidence would have carried them little or no distance in this case towards implicating the appellant. It was essential that the appellant should be linked up with the purse, either by oral confession or by its equivalent - tacit admission of knowledge of its whereabouts obtained as a sequel to the interrogation. That, I am afraid, is an end of the case.

In *Reg. v. Beere* [1965] QDR 370 Gibbs J, sitting in the Supreme Court of Queensland, followed the decision in *Chalmers v. H.M. Advocate*.

So far as the law in England is concerned the position is now covered by s. 76 of the Police and Criminal Evidence Act 1984 which provides:

76. (1) In any proceedings a confession made by an accused person may be given in evidence against him in so far it is relevant to any matter in issue in the proceedings and is not excluded by the Court in pursuance of this section.

(2) if, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the Court that the confession was or may have been obtained:

(a) by oppression of the person who made it; or

(b)in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the Court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the Court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(3) In any proceedings where the prosecution propose to give in evidence a confession made by an accused person, the Court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.

(4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence:

(a) of any facts discovered as a result of the confession; or

(b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.

(5) Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.

(6) Subsection (5) above applies:

(a) to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and

(b) to any fact discovered as a result of a confession which is partly so excluded, if the fact is discovered as a result of the excluded part of the confession.

(7) Nothing in Part VII of this Act shall prejudice the admissibility of a confession made by an accused person.

(8) In this section 'oppression' includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).

It is also worth nothing the definition of a confession in s. 82(1):

82 (1) In this Part of the Act:

'confession', includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise;

It is thus clear that the appellant's evidence relating to the discovery of the knife would not be admissible in English proceedings: see s. 76(5).

Their Lordships are of the view that the more recent English cases establish that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody. All three of these factors have combined to produce the rule of law applicable in Hong Kong as well as in England that a confession is not admissible in evidence unless the prosecution establish that it was voluntary. This, perhaps the most fundamental rule of the English criminal law, now finds expression in England in s. 76 of the Police and Criminal Evidence Act 1984 and never did admit of the exceptions to be found in the Indian and Ceylon Criminal Codes and in a few of the cases in the late 18th and early 19th century.

With these considerations in mind their Lordships turn to consider the decision of the Hong Kong Court of Appeal in *Ng Wai-Ming v. R.* [1980] HKLR 228 upon which the trial Judge and the Court of Appeal relied. The facts in that case were that the accused was the driver of a security corps van which was robbed of a very large sum of money in a hold-up. Suspicion fell upon the accused as the inside man in the robbery. He confessed his part in the robbery to the police and then led the police to various places from which were recovered a total $396,000. The Crown conceded that the confession, including the statements of the accused which proceeded and accompanied the finding of the money, were inadmissible because the accused might have been induced to make them by a hope held out to him by the police that he might be treated as a prosecution witness. As the Court of Appeal said:

The main evidence against the accused was his knowledge of the whereabouts of the very large sums to which he led the police. The Crown says that the irresistible inference is that they must have been the proceeds of the robbery.

The Judge admitted the evidence of the police describing how the accused led them to the various places from which the money was recovered. If the police had merely been permitted to give evidence of the places from which they recovered the money it would not have advanced the case against accused. What was damaging to the accused was that he was able to show the police the whereabouts of the very large sums of money.

The Court of Appeal upholding the Judge's ruling on admissibility relied upon the passage in *R. v. Ramasamy* already quoted. It is understandable that they should have done so, but their Lordships are unable to accept that the exception which appears to have existed for a short time in the early part of the 19th century, under which evidence of part of a confession was admitted, ever became established as a part of the common law. Such a development was repudiated by Lord Scarman in the following passage of his speech in *R. v. Sang*:

Long before 1898, however, the Courts were faced with the problem of reconciling fairness of trial with the admissibility of evidence obtained as a consequence of an inadmissible confession. The problem was resolved in *Rex. v. Warickshall* [1783] 1 Leach 263 by the Court declaring at p. 300:

> Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived.'

The discovery of the stolen goods in that case, or (as in *Reg. v. Berryman* [1854] 6 Cox 388) the finding of the remains of the corpse, is the best possible evidence of the truth of the confession (compare and contrast the Canadian approach in the Supreme Court decision *Reg. v. Wray* [1970] 11 DLR (3d) 673): but in English law the confession is in admissible, not because it is unreliable (its reliability is established by what has been found), but because to admit it would be unfair.

Their Lordships are therefore of opinion that *R. v. Ng Wai-Ming* was wrongly decided and that the evidence that the accused took the police to the place where the money was hidden ought not to have been admitted as it was part of an inadmissible confession.

In the present appeal the Court of Appeal in addition to relying upon *R. v. Ng Wai-Ming* founded their judgment upon the view that the reliability of the confession was the major consideration when considering its admissibility and further said:

> In such a case involuntary statement is admitted not to prove the truth of its contents, but to prove the knowledge or a state of mind of the accused. Thus a statement which amounts to an expression of knowledge of some fact of the crime and is relevant to show and suggest guilt is a question of fact, and that fact may be established irrespective of whether the statement asserting the fact becomes evidence of knowledge by being confirmed by a subsequent discovery or by an already known fact.

But it is surely just as reprehensible to use improper means to force a man to give information that will reveal he has knowledge that will ensure his conviction as it is to force him to make a full confession. In either case a man is being forced into a course of action that will result in his conviction: he is being forced to incriminate himself. The privilege against self-incrimination is deep rooted in English law and it would make a grave inroad upon it if the police were to believe that if they improperly extracted admissions from an accused which were subsequently shown to be true they could use those admissions against the accused for the purpose of obtaining a conviction. It is better by far to allow a few guilty men to escape conviction than to compromise the standards of a free society.

Their Lordships are satisfied that the evidence of the police and the silent video recording relating to the conduct of the appellants leading to the discovery of the knife should not have been admitted as it was evidence of an inadmissible confession. Without this evidence there was nothing to link the appellants to the murder weapon and the prosecution do not seek to uphold the convictions in the absence of such evidence.

The appellants are entitled to their costs in the Court of Appeal and before their Lordships' Board.

Also found at [1991] 2 CLJ 1082